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SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 5

RAPHAEL KONIGSBERG,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA AND THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

I.

Nature of Interest of *Amicus Curiae.*

This *amicus curiae*, The National Lawyers Guild, is a national bar association and, as such, it is of necessity concerned with the maintenance of an independent Bar and the promotion of justice in the administration of the law. As lawyers, we have a special interest in the criteria for admission to the Bar, and in the application of such criteria in individual cases. Arbitrary, capricious or otherwise unlawful action in this area by administrative or court officials presents a threat to the independence of the Bar and the administration of justice. We subscribe to the view expressed by Chief Justice Taney many years ago that the power to determine who is qualified to be admitted to practice law is not "an arbitrary and despotic one, to

be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by this court, as the rights and dignity of the court itself." *Ex Parte Secombe*, 19 Howard, 9, 13.

Petitioner here appears to have been excluded from his chosen profession for reasons unrelated to the nature and purpose of his calling. The calling of a lawyer requires independence of thought and action, vigorous, fearless and effective advocacy. Often it may demand the courage to support a client's cause against prevailing economic, social and political forces and, indeed, against the government itself. A lawyer will be called upon to argue even to this Court that its ruling of yesterday was in error, that its well-considered judgments should be reversed.

A lawyer is, almost by definition, a challenger to the *status quo*. For if the lawyers had not come forward to challenge long established ways of life and long-recognized precedents of government would we not still be living in a society dominated by laissez-faire economics and "separate but equal" education?

Any criterion for admission to the Bar which concerns itself with an applicant's beliefs or opinions concerning the state, or his expressed opposition to the state, or particular aspects of the existing structure of the state, or indeed, of the society in which we live, and which have the effect of excluding applicants who have in fact opposed, or are suspected of opposing those "who sit in the seats of the mighty", will hardly serve to improve the quality of the Bar. Rather, it will weaken the Bar by excluding those who may indeed be most capable of vigorous and fearless advocacy against powerful opposition. If an applicant's political views or associations are to be com-

pulsorily disclosed as a condition to admission to practice, we may find a Bar left without members able to offer wholehearted acceptance of the oath that many a lawyer takes upon admission: that he will "never reject for considerations personal to [him]self the cause of the helpless or the oppressed".

We do not believe that applicants for admission to the practice of the law lose their constitutional rights as citizens, nor that they can be compelled to forswear those rights as a condition for admission to the Bar. We do not believe that such persons can be treated as if they were mere applicants for a "job" or striving to enlist in the military or certain services of the United States. Petitioner here appears to have been excluded from his chosen profession for reasons unrelated to the nature and purpose of the calling which he sought to exercise. In imposing nebulous qualifications, then accusing petitioner of failing to meet them, constitutional limitations have been disregarded.

An examination of the briefs and petitions heretofore filed in this case does not indicate that these questions of public importance have been adequately covered by the parties. The National Lawyers Guild therefore asks leave to file the brief herein *amicus curiae*. We are gravely concerned with the issues involved because the radial effect of a decision on this case will extend beyond the borders of California, affecting the right of persons not only to pursue their chosen professions in the states but in the federal jurisdiction as well. Attorney for the petitioner has consented to the filing of this brief but the attorney for the respondent has refused his consent.

Respectfully submitted,

OSMOND K. FRAENKEL,
Counsel for Petitioner.

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Respondents.

—o—

BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT

California requires that applicants for admission to the Bar shall be persons of "good moral character" (Calif. B. & P. C., Sec. 6060c) and shall not presently advocate the overthrow of the government, federal or state, "by force, violence, or other unconstitutional means" (Calif. B. & P. C., Sec. 6064.1).

The petitioner appears to have disavowed all advocacy of the forcible overthrow of the government. Furthermore, he appears on the record to have furnished overwhelming evidence of good character, but, nevertheless, has been held not to have sustained the burden of proving that he is a person of "good moral character."

The justification for the denial of petitioner's application is not specified by the committee, and this notwithstanding that the committee's own rules apparently provide

that an applicant shall be informed of the information on which an adverse decision is based. (Rules for admission to the Bar, 35 West Pub. Co., 1951.) Unless the committee had derogatory information in its possession gathered from confidential questionnaires sent out to his references, employers, or others, or furnished by the Federal Bureau of Investigation in accordance with the admission procedures above described, and based its denial on such information without disclosing such fact, the justification appears to rest upon one or all of the following grounds: (1) That he once expressed certain views in the columns of a newspaper and declined to explain or indicate whether he still maintained the same opinions; (2) That he made certain statements and gave certain testimony before a State Senate Committee; (3) That he allegedly attended some meetings of the Communist Party in 1941 and declined to answer questions with respect to his membership in that party, although in answer to a question as to whether he was a Communist he had said "I will say no, definitely no." Specifically stating that he did not invoke the Fifth Amendment, his refusal to answer further concerning his political, social and economic views and affiliations appears to have been based on the First Amendment and a conviction that one's beliefs are protected from government scrutiny and proscription.

ARGUMENT

POINT I

Admission to the Bar cannot be arbitrarily denied nor can it be conditioned upon the relinquishment of Constitutional rights.

As the Committee did not specify the grounds upon which it denied petitioner's application, we must consider the two *possible* grounds of its denial to discover whether either can meet the due process requirements of the Fourteenth Amendment. We shall assume, first, that the denial was based on the ground of lack of "good moral character" and, second, the committee concluded that petitioner presently advocates the overthrow of the government by unconstitutional means; finally, we shall seek to discover whether there is any rational—and constitutionally permissible—basis for the denial of petitioner's application.

A. The test of "good moral character" as here applied violates the Fourteenth Amendment by denying due process and abridging freedom of speech and association.

We shall not enter here into the age-old controversy: whether a license to practice law is a "privilege" or a "right." For these words lend themselves more readily to conclusions than to intelligent argument, and a reading of the cases can only show that what the courts have seen fit to protect under the due process clause has been labeled a "right" while that which is denied protection is brushed off as a "mere privilege." But we need not argue this, for even "privileges" cannot be withdrawn or withheld in purely arbitrary fashion nor conditioned upon the prior relinquishment of Constitutional rights.

"Protection of the individual from arbitrary action" is the very essence of due process, *Ohio Bell Telephone Co.*

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IN THE

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No. 244

RAPHAEL KONIGSBERG,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA AND THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The American Civil Liberties Union, Southern California Branch, by and through its counsel, respectfully requests permission to appear as *Amicus Curiae,* and to file the within brief in support of petitioner's position in the above entitled cause.

Counsel for the American Civil Liberties Union have read the record at bar, and have familiarized themselves with the arguments presented by the parties hereto, and believe there is need for further argument upon one of the points advanced by petitioner.

This applicant is dedicated to the support and protection of the civil liberties and rights of all persons, irrespective of status, politics, origin or the nature of the crime charged. The Union believes that freedom of thought, expression and association are the most precious possessions the American citizen has; and that these freedoms guarantee a dynamic and thoughtful body politic and a democratic government. But to serve this function, speech and beliefs must be left free of governmental restraint, save that minimal amount reasonably essential to preserve ordered liberty.

It would appear in the case at bar that petitioner has been denied a license to practice law in California on account of what he believes, not for what he does. The independence of the Bar is thereby put in peril; but more importantly, the right to speak and think has been made the hostage of the need to work. California's laudable desire to protect itself against subversion must be balanced against those principles which, in fact, it is supposed to be safeguarding: liberty, and the free choice of a livelihood. The American Civil Liberties Union believes the scale is not in balance here because the State has a finger on it.

Because respondents here have construed a State statute in a manner which gives government the power to permit a citizen to work only if it agrees with his ideas, and approves of his associates; and because such assertion of power by the State constitutes a clear and present danger

to the civil liberties of every man; and because the action of the State in the case at bar is of special concern to the American Civil Liberties Union, it is respectfully requested that applicant be granted permission to file the within brief in support of petitioner's position. Consent to the appearance of the Union as *Amicus* has been withheld by respondents solely because they prefer to leave that question for this Honorable Court to decide.

Respectfully submitted,

A. L. WIRIN,

HUGH R. MANES,

Counsel, American Civil Liberties Union, Southern California Branch.

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BRIEF OF AMICUS CURIAE.

ARGUMENT.

The Statutes at Bar Have Been Unconstitutionally Applied by Respondents as a Prior Restraint on Speech, Press and Assembly.

Under the law of California, admission to practice law in that State is conditioned upon the good moral character of the admittee;[1] and may be denied to one who advocates the overthrow of government "by force, violence, or other unconstitutional means."[2]

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[1]California Business and Professions Code, §6060(c), as amended (1951).

[2]California Business and Professions Code, §6064.1, as amended (1951).

Respondents are authorized by California law to pass upon the foregoing, and other qualifications, of each applicant for the Bar, and to certify those whom it deems qualified to the Supreme Court of California.[3] The record at Bar reveals that between September, 1953, and March, 1954, respondents conducted four separate hearings [R. 4, 46, 86, 96],[4] purportedly to determine petitioner's fitness to practice law in California [See: *e.g.*, R. 34, 118, 131]. Documentary and oral evidence was introduced therein by respondents consisting of 1) some twenty-one editorials which petitioner wrote for a newspaper called The California Eagle, between July and December, 1950 [R. 73];[5] 2) a transcript of petitioner's testimony in 1948 before the State Senate Fact-Finding Committee on Un-American Activities (Tenney Committee) [R. 247-259]; and, 3) testimony of a former member of the Communist Party placing petitioner in the Party in 1942.[6]

Respondents propounded numerous questions to petitioner, virtually all of which related to his editorial opinions and associations. Petitioner declined to answer some of these inquiries, and upon the conclusion of the proceedings, he was notified that his application for admission

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[3]California Business and Professions Code, Div. 3; Ch. 4; Rule 1(2), of Rules Regulating Admission to Practice Law (West's California Codes).

[4]"R" refers to the "Transcript of Record" of the proceedings below; and thereafter follows the page number at which such reference may be found.

[5]Whereupon, petitioner added to the record the balance (twenty-nine) of the articles he had written for that paper [R. 73], and the sources for some of his articles [R. 272-286(h)].

[6]On the other hand, the record also contains thirty-six testimonials to petitioner's character [R. 287, *et seq.*]

to practice law had been denied. The grounds stated therefor were: That he had failed to establish that he 1) was of good moral character, and 2) was not an advocate of the forceful overthrow of government.[7] Subsequently, petitioner's application for Hearing to the Supreme Court of California was denied without opinion [R. 132]; and this Court granted certiorari (..... U. S. ....., 100 L. ed. (Advance p. 647), 5/21/1956).

Amicus believes that the petitioner's past beliefs and associates were no concern of the State's; that questions about them should not have been asked, and need not have been answered because they were not reasonably related to petitioner's fitness to practice law. The reasons in support of this view follow:

It is elementary that a State may establish and enforce within its borders standards of *conduct* which will safeguard the health, welfare and safety of everyone there (*Barsky v. Board of Regents,* 347 U. S. 442, 449).

Accordingly, the state may impose such reasonable regulation upon businesses and professions as will protect the public from corrupt and inept practices (*Dent v. West Virginia,* 129 U. S. 114, 123), and may even exclude from certain occupations persons whose deportment does not meet announced standards (*Barsky v. Board of Regents, supra*).

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[7]The Record at bar discloses only the decision of the sub-Committee of respondent Committee of Bar Examiners, which gave the first reason as the sole ground for denial. *Amicus* is advised that the decision of the whole (respondent) Committee, dated May 17, 1954, containing the additional ground therefor, was inadvertently excluded from the Record, and that the Clerk of this Court has been requested by Petitioner to insert same as a part thereof.

Honesty, probity and feasance, however, are ascertainable indices of *conduct*, long a part of the common law, if not upon the statute books of every state. A vocation maintaining direct relations with the public obviously requires such virtues of those occupied in it; and the rejected licensee cannot be heard to complain if his biography fails to reveal an adherence to common ethics which the law commands of every man.

But whatever interest the state has in its licensees' moral habits stops at the threshold of their opinions and associations (*Near v. Minnesota*, 283 U. S. 697; *DeJonge v. Oregon*, 299 U. S. 353; *Lovell v. Griffen*, 303 U. S. 444; *West Virginia Board of Education v. Barnette*, 319 U. S. 624; *Thomas v. Collins*, 323 U. S. 516; *Hannegan v. Esquire, Inc.*, 327 U. S. 146; *Saia v. New York*, 334 U. S. 558; *Lawson v. Housing Authority*, 270 Wis. 269, 70 N. W. (20) 605; cert. denied, 350 U. S. 882; *Housing Authority v. Cordova*, 130 Cal. App. (2d) 883, 279 P. (2d) 215; Cert. denied, 350 U. S. 969). For opinion—whether printed or parol—does not lend itself to "trial." And when governments—or courts—undertake to adjudge men by what they say—or by the company they keep—the fallibility and human inconsistency of such judgment becomes all too plain.

In *Fiske v. Kansas*, 274 U. S. 380, for example, the Supreme Court of Kansas had ruled that the language constituting the then preamble of the I. W. W. Constitution amounted to punishable advocacy of the forceful overthrow of organized government. Upon review, this Court declared the very same language incapable, as a matter of law, of supporting such a meaning, and held the document entitled to Constitutional protection.

Similarly, in *Sicurella v. United States,* 348 U. S. 385, a defendant claimed that he deserved classification under the draft laws as a conscientious objector. His status hinged upon an evaluation of his written reply to the question: Under what circumstances, if any, do you believe in the use of force? The defendant's reply was declared by the draft board, the District Court and the Court of Appeals to evidence a belief in force, thus disallowing exemption. Nevertheless, the Supreme Court, reading the same language, concluded differently.

Conversely, in 1943, this Court was able to draw from Marxist-Leninist books a "tenable conclusion" that the Communist Party did not advocate force and violence (*Schneiderman v. United States,* 320 U. S. 118, 157). Yet, virtually all of this same literature is submitted in Smith Act cases as evidence that that doctrine is advocated against government today (See *e.g., United States v. Lightfoot,* 228 F. 2d 861, cert. granted, 350 U. S. 992).

But there is more at stake here than speech. Petitioner has an estate in the practice of law; he spent three years preparing for it, at great personal sacrifice, and at an advanced age [R. 7, 34-35, 104]. Due process forbids that a man should be denied employment because of the color of his skin (*Yick Wo v. Hopkins,* 118 U. S. 356; *Takahashi v. Fish and Game Commission,* 334 U. S. 410; cf. *Alston v. School Board* (CCA 4th, 1940) 112 F. 2d 992); or because of his place of birth (*Truax v. Raich,* 239 U. S. 33); or on account of innocent beliefs or associations (*Cummings v. Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333; *Wieman v. Updegraff,* 344 U. S. 183; cf. *Slochower v. Board of Education,* 350 U. S. 551; *Cole v. Young,* 351 U. S. 536). The censor-

ship power is "so abhorrent to our traditions that a purpose to grant it should not be easily inferred" (*Hannegan v. Esquire, Inc., supra,* p. 151; *Saia v. New York, supra*).

Clearly, California has here gone far beyond its legitimate function of protecting the consumer and the client. Petitioner has been deprived of an opportunity of following his professional calling *not* because he was once convicted of *embezzlement,* or *fraud* or *perjury;* but rather because respondents do not trust his ideas. For the record at bar discloses that respondents were most concerned about such matters as:

> "Mr. Sterling: I assure you I don't want to get into a debate on the subject, *but the thing that strikes me about the editorial line expressed in your writings in the Eagle is that it is not anti-communist* . . ." . . . [R. 19, 20].
>
> * * * * * * * *
>
> "Q. (By Mr. Preston) . . . (w)hat I frankly am trying to ascertain is understand your viewpoint . . . and I referred you to this editorial, 'The Gangsters, Incorporated,' to ascertain whether or not you felt that this was a beneficial bit of *education,* something that would help America, help its citizens.
>
> A. I may have felt that at the time.
>
> Q. *Do you still feel that way?*" [R. 24.]
>
> * * * * * * * *
>
> "Q. (By Mr. Preston, after quoting aloud excerpts from one of petitioner's editorials): . . . Now that is two paragraphs taken from your article as indicated. What I am asking you is do you feel

that that is the proper approach educational-wise for a person who seeks to be a member of the Bar?" [R. 25.]

* * * * * * * *

"Q. I assume that you are acquainted with the State statute [Sec. 6064.1, Business and Professions Code] that we now have on the books where among other things we are obliged to inquire into this type of a thing, and where we find that any people appear to have views of endeavoring to change our government and so forth by force and violence, *or in other words the popular conception of communism* that we are expressly prohibited from certifying that person. You are familiar with the statute?

"A. Yes, I am.

"Q. Mr. Konigsberg, are you a Communist?" [R. 28, 29.]

* * * * * * * *

"Q. . . . The only way I can find out and aid this Committee in finding out about your character is to ask you these questions . . ." [R. 31.]

* * * * * * * *

"Mr. Fuller: What organizations do you presently belong to?" [R. 109.]

* * * * * * * *

"Mr. Fuller: . . . *I think we are entitled to know who he associates with.*" [R. 109.]

Here is censorship at its worst. Here is the shocking spectacle of lawyers who not only inquire into petitioner's belief's and associations, but challenge their validity. Of what concern to the State are such matters? Respondents explain that they are indicative of moral character and loyalty. But morality is concerned with the difference

v. *Comm'n*, 301 U. S. 292, 302, and where a standard for admission to the Bar is so vague as to allow wholly arbitrary action, and is so applied as to abridge First Amendment rights, it must be struck down as a violation of the due process clause of the Fourteenth Amendment, (Cf. *Burstyn* v. *Wilson*, 343 U. S. 495, and Mr. Justice Frankfurter's concurring opinion therein).

On its face, the requirement that an applicant for admission to the Bar be a person of "good moral character" is reasonable and is, indeed, an almost universal qualification. But this assumes that the words are to be taken in their ordinary, everyday meaning. When "good moral character" is extended to encompass orthodox political thinking and governmentally approved speech and affiliation, when, in effect, the measuring stick is made of elastic, the standard is a standard no longer and must be struck down as a violation of due process.

In defending the application of loyalty tests as a condition of the right to practice law and in suggesting that the test of "good moral character" might be deemed to include disavowal of beliefs and affiliations which the examining committee deems improper, Brown and Fassett in their article "Loyalty Tests for Admission to the Bar" (20 U. Chi. L. R. 480, 1953), said:

> "[A]n ordinary citizen might believe with utmost sincerity and devotion to his country that its welfare required abstention from violence under all circumstances, even against invasion. Contrariwise, another might urge immediate resort to violence to overthrow a government he believed to be corrupt. Whether such beliefs are permissible for a lawyer has been questioned."

We suggest that the First Amendment forbids us to entertain the concept that a lawyer—or anyone else—needs

permission to believe what he does believe. And the necessary corollary must be that one cannot be denied the right—or the privilege—of practicing law in return for the surrender of one's constitutional right to believe what he does believe. (See Willcox, "Invasions of the First Amendment Through Conditioned Public Spending," 41 Cornell LQ.12 (1955).) "The courts may not regard such refusal [to deny membership in 'subversive organizations'] as an adverse reflection upon character." *In re Adoption of a Minor* (D. C. Cir. 1955), 228 F. 2d 446, 448.

Once it was sought to bar from the legal profession those who had not merely *advocated* forcible overthrow of the government but who had rather actually participated in supporting the forces of the Confederacy when it sought by force of arms to overthrow the government. *Ex parte Garland,* 4 Wall. 333. When *Garland* was decided, applicants for admission to practice before the United States Supreme Court were required to be persons of "fair character." Yet it did not occur to this Court to conclude that Garland's political crime of supporting the Confederacy in its actual attempt to overthrow the government of the United States should serve as any evidence of lack of "fair character."

The suggestion that the holding of revolutionary or quasi-revolutionary beliefs is not "permissible for a lawyer" and is evidence of lack of "good moral character" is absurd on its face, but even more absurd in the light of our national history. "It would raise serious questions about the good moral character of such lawyers" (to name only three) as

> "*Thomas Jefferson,* who said: 'I hold it, that a little rebellion, now and then, is a good thing, and is necessary in the political world as storms in the physical. * * * It is a medicine necessary for the sound health of government.'

"*Alexander Hamilton* who said in the Federalist: 'If the representatives of the people betray their constituents, there is then no resource left but in the exercise of that original right of self-defense which is paramount to all positive forms of government • • •'

"*Abraham Lincoln,* who said in his First Inaugural: 'This country belongs to the people who inhabit it. Whenever they shall grow weary of the existing Government, they can exercise their *constitutional* right of amending it or their *revolutionary* right to dismember or overthrow it.'"

Countryman, Loyalty Tests for Lawyers, XIII Lawyers Guild Rev. 149, 157 (1954).

B. A finding, upon the evidence herein, that petitioner advocates forcible overthrow of the government can only be reached in derogation of the requirements of due process of law.

Petitioner has denied that he advocates forcible overthrow of the government and according to the record, there was no evidence before the committee to the contrary. If the committee had such evidence, it was not disclosed to petitioner and he was given no opportunity to rebut it. If there were witnesses to testify to such advocacy they are the "faceless informers" who cannot breathe the clear air of a courtroom nor withstand for a moment the unmasking of confrontation and cross-examination. Any deprivation of right or privilege based upon such evidence is a rank denial of due process of law. *Parker* v. *Lester* (9th Cir. 1955), 227 F. 2d 708.

But perhaps the committee had no such evidence and reached its conclusion upon inferences from the evidence before it. Thus it may have concluded, on the basis of testimony that petitioner attended some meetings of the Com-

munist Party in 1941, that he was then a Communist Party member. It would then proceed to build a second inference upon the first—that at the time of such membership he personally advocated forcible overthrow of the government. A further inference upon an inference would be required—and this in the face of petitioner's denial that he is a Communist and his assertion that he opposes forcible overthrow—that he presently advocates the forcible overthrow of government. This tower of inferences must topple. Certainly it does not deserve the name of evidence, and citation of authority is surely superfluous.

The only remaining alternative hypothesis is that the committee assumed that petitioner's refusal to answer questions concerning Communist Party membership warrants an inference that he was and is a knowing member of the Communist Party. Such an inference from a refusal to answer on grounds of possible self-incrimination—and *a fortiori* on First Amendment grounds—is improper: *Slochower* v. *Board of Education*, 350 U. S. 551 (1956). And cf. *Adamson* v. *California*, 332 U. S. 46, 55 (1947) where this Court offered as an example of state legislation which would deny due process "a statute [which] declare[d] that a permitted refusal to testify would compel an acceptance of the truth of the prosecution's evidence."

C. On any theory, denial of an application to practice law because of political beliefs and affiliations is an unconstitutional abridgment of "First Amendment Rights".

The First Amendment guarantees that no one will suffer punishment, at the hands of the Government, for the expression of his beliefs or associations or for the refusal to disclose such beliefs and associations. The freedom of speech and association, thus guarded by the First Amendment, is among the fundamental rights and liberties protected, by the due process clause of the Fourteenth Amend-

ment, from infringement by the States. *Near* v. *Minnesota*, 283 U. S. 697, *De Jonge* v. *Oregon*, 299 U. S. 358, *Stromberg* v. *California*, 283 U. S. 359.

The protection extends to action by any arm or agency of the State.[1] It applies to the Committee appointed by this Court to pass on character and fitness. Such a hearing is part of the procedure for admission to the Bar and the authority exercised by such Committee is "not a mere ministerial power. It is the exercise of judicial power and has been so held in numerous cases." *Ex Parte Garland*, 4 Wall. (U. S.) 333, 378. See also, *In re Summers*, 325 U. S. 561, 570, where the Court said that while "the responsibility for choice as to the personnel of its Bar rests with Illinois", nevertheless "a decision which violated federal rights secured by the Fourteenth Amendment would authorize our intervention."

An inquiry into the field of a person's beliefs, his political views and his membership in political and quasi-political organizations infringes upon rights protected by the First and Fourteenth Amendments, and a decision of a Committee of this Court that the right to practice law depends either upon the applicant's willingness to answer such questions or upon the nature of his answers is "a decision which violated federal rights".

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[1] *Burstyn* v. *Wilson*, 343 U. S. 495 (Commissioner of Education); *Kunz* v. *People*, 340 U. S. 290 (Police Commissioner); *Cantwell* v. *Connecticut*, 310 U. S. 296 (Public Welfare Council); *Public Utilities Comm.* v. *Pollak*, 343 U. S. 451 (Transit company operating under franchise and supervision of Federal Government Agency).

POINT II

The state action here is a challenge to the independence of the Bar.

If it is the calling, and not the person, to which standards of fitness must be reasonably related under the Constitution, the fundamental inquiry must be as to the nature and function of the calling of the lawyer and the importance of the lawyer in our constitutional system. Whether a state has acted within appropriate constitutional limitations, or arbitrarily deprived a person of a right to pursue a calling can be determined initially only by so examining the attributes of the right which the person seeks to exercise. Cf. *Ex parte Garland*, 71 U. S. 333, 378-80.

The Sixth Amendment to the Constitution provides that in all criminal prosecutions the accused shall enjoy the right "to have the assistance of counsel for his defense". The right is of such character that it cannot be substantially denied without violating the due process provisions of the Constitution. *Powell* v. *Alabama*, 287 U. S. 45. Clients are entitled to "fearless, vigorous and effective" advocacy. *Offutt* v. *United States*, 348 U. S. 11. They are entitled, of course, to lawyers who have sufficiently established their knowledge of the law and who have not themselves been proven guilty of violations of the criminal law or acts of dishonesty. If these qualifications be met, the primary requirement of the client is that he be fearlessly and courageously represented. "The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. *No fear* of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty." American Bar Association, *Canon of Ethics*,

No. 15 (emphasis added). Intrinsic then to the proper representation of a client is freedom from fear and constraint—in short, independence of mind and action.

The aggregation of clients and prospective clients is the people, who have a fundamental interest in the administration of justice and the courts. Again, this Court has observed that the preservation of the independence of the bar is "too vital to the due administration of justice" (*In re Watts,* 190 U. S. 1, 29) to allow any dubious intrusions therein. All persons understand that there can be no fair trial in a court of law without the aid of independent counsel and that the cornerstone of our system of justice is fair trial for all. "Those of us who are custodians of the law, *sworn to uphold constitutional traditions, in our daily work,* have a special responsibility. *We have the duty* to see to it that the recurring episodes and expedients by which dominant influences exploit mistrust and intolerance do not become the accepted pattern". Justice William O. Douglas, *A Crusader for the Bar: Due Process in a Time of World Conflict,* 39 A. B. A. J. 871, 874 (1953) (emphasis added).

Ever since the original attorneys for Peter Zenger were disbarred because they filed exceptions to the authority of the justices to sit at the trial (Trial of Zenger, 17 How. St. Tr. 673, 683-87), the importance of an independent Bar to the administration of justice has been recognized. See, Stansbury, *Report of the Trial* of *James H. Peck, Judge of the United States District Court* (1833), pp. 448-450. See also, *Offutt* v. *United States,* 348 U. S. 11, 13; *Cammer* v. *United States,* 350 U. S. 399, 403-4. "Qualifications" for admission to the Bar, and their application and construction in particular cases, should be measured against the aforesaid fundamental requirement in testing constitutional power.

Moreover, the lawyer has a duty to lead the community in the preservation of democratic rights, not to become a

conforming robot as a condition to entrance into the profession. "The traditional function of lawyers is that of servant to the whole people, guarding justice and expanding the areas of individual freedom. The judgment of history on the lawyers of our generation will be based on how adequately we have fulfilled this noble calling". William T. Gossett, General Counsel to Ford Motor Co., *Address to Michigan Judges Ass'n.* (Release of Ford News Bureau, Sept. 5, 1952). Indeed, it is a "moral" and "ethical" duty for a lawyer to inform the public whenever he believes that fundamental rights are being violated by government officials or any dominant group. This can hardly be done by craven men. "For owing to the fact that we live under popular government, and that legislation may in its origin and formulation proceed in ignorance or defiance of fundamental and constitutional rights or guarantees, the lawyer may find himself, in the very discharge of his duty to the community, bound to question, criticize and attack the validity or enforcibility of laws; and if laws believed by him to be invalid touch the security or rights of his client, he *must be fearless* in asserting that belief, in the appropriate forums of justice, or public opinion, or even in the legislative halls themselves". Jessup, *The Professional Ideals of the Lawyer, A Study of Legal Ethics* (N. Y. 1925), p. 24 (emphasis added).

There are, in the final analysis, pragmatic reasons for an independent Bar. History supports the view that it is to an independent Bar we owe much of our present power to freely discuss the acts of government officials. If there exists the privilege of meeting for the promotion of needed reforms; if those who desire changes in our Constitution may still be recognized as patriots, and not doomed to die the death of traitors, no little credit is due the courageous lawyers who throughout the centuries have refused to truckle to anyone in the discharge of their duties. See, Lord Brougham on *Thomas Erskine*, quoted in 1 Cooley's Const. Lim., 8th ed., p. 704, footnotes.

CONCLUSION

California has fashioned a measure for the fitness of persons to practice law which is incompatible with the right sought to be exercised. The tailoring is arbitrary, irrational and unlawful; it cuts off a fundamental right and does not conform to the requirements of due process.

Respectfully submitted,

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